IN THE

Supreme Court of the United States

OCTOBER 1959 TERM

No. 203

CONTINENTAL OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

REPLY BRIEF OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION

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STATUTES

Natural Gas Act of 1938, 52 Stat. 821, as amended by 56 Stat. 83, 15 U.S.C. Secs. 717 et seq:	
Section 1(b)	3, 4, 7
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The Commisison's Brief in Opposition permits us to focus the issues in their true perspective.

THE COMMISSION'S CONTINUING MISAPPREHENSION OF SECTION 7(c)

The Commission has been at pains to make it appear that its power to certificate a producer's sale cannot arise unless the producer has at the same time facilities available for certification as "facilities for sale". The fact that Section 7(c) authorizes certification of sale alone and apart from whether the producer has facilities for sale, the Commission ignores. The fact that such power granted by that Section supports and is consistent with the dominant purpose of Congress to regulate and control *sales* in interstate commerce for resale, the Commission disregards. (See Petition, p. 12-13.)

This misconception even leads the Commission (Br. p. 7) to transpose this Court's holding in *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672, to the disjunctive provisions of Section 7(c). But in *Phillips*, this Court declared the disjunctive language of "transportation or sale for resale" had effect to broaden and enlarge, not to narrow and restrict, Commission jurisdiction. The disjunctive provisions of Section 7(c) despite the Commission's misleading, equally enlarges and broadens jurisdiction. For that Section authorizes a certificate for a sale, irrespective of facilities, as well as a sale where there are also "facilities for sale." In Petitioner's submission, Congress by that language recognized there could be sales in interstate commerce for resale where the seller had no facilities for sale, and thus carefully made provision for certification thereof.

The passing suggestion (Br. p. 8 Fn. 3) that Section 7(c) must require a sale to be accompanied by "facilities" because Section 7(b) enforcement against abandonment depends on facilities, finds no support in that Section. A certificate of sale alone arms the Commission with all power needed to enforce Section 7(b). The sale is paramount. Guarantee of its continuance to depletion of the supply is the purpose of Section 7(b). If the supply be cut off "without the permission and approval of the Commission first had and obtained", the Commission would have available for use the full armament of Section 7(b). The presence of "facilities" would add nothing to the Commission's power to prevent shutting off of the flow of gas. If the conditions of a certificate of sale thus issued were breached, the full power of Sections 21(a) and (b) would be applicable. It is clear that "facilities" are not the central core of Section 7(c) power. If the producer does have and operate facilities *for sale*, Section 7(c) also provides for their certification. But the thing that counts, that incites

Commission power of regulation, is the sale and its continuance.

THE BREACH OF SECTION 1(b)

The refusal to respect the plain meaning of Section 7(c), the notion that certification of a facility is prerequisite to certification of sale, has led the Commission to grab a prohibited production facility (See Petition p. 10-11).

It has conceded (Br. p. 3) that the Christmas tree valves "are not suited to use for controlling the flow" of gas. This confesses Petitioner's claim and the demonstration of the uncontradicted record that the Christmas tree valves are not and cannot be facilities for sale. A "facility for sale" can only be a contrivance designed to control the rate and quantity of flow, and thus delivery. The purchaser (El Paso) owns and operates those facilities here.

The Commission admits (Br. p. 3-4) that Petitioner's facilities end at the point where El Paso's facilities are attached, so that delivery of the gas is effected at that point. But "that point" is El Paso's facility inserted in the well-stream before production is completed. Thus the "holding" of the Commission (Br. 4) is directed not at Petitioner, but at the purchaser.

Indeed, the Commission frankly declares El Paso's facilities are the sales facilities jurisdictional to the Commission and subject to its Section 7(b) power (Br. p. 8, FN 3).

In the light of these concessions, we need only to refer to our discussion (Petition p. 14-17) demonstrating that Section 7(c) does not authorize the Commission to invade the prohibited area of Section 1(b), and that as the Commission has represented to this Court (Petition p. 15), Section 1(b) does not affect its jurisdiction over sales.

These concessions make strange the claim (Br. 5-6) that the Commission, and the Court below, found that the Peti-

tioner had "facilities" purely for sale. The Commission Order (App. 41a) issuing certificate, and its Order denying rehearing (App. 52a) will be searched in vain for any such holding. On the contrary, those orders clearly set forth that the Commission recognized Petitioner's facilities to be production facilities, but under what it misconceived the compulsion of Section 7(c), declared they aided and abetted a sale. Said the Commission, " * * * it is apparent that such portions of the Christmas tree that are owned by Continental and serve to contain the gas at the point of delivery are facilities for effecting the sale of gas in interstate commerce, *regardless whether they serve also to effect production.*" (Italics by the Commission, App. p. 47a.)

The uncontradicted evidence was that the Christmas tree valves had nothing to do with the sale of gas, and neither by design or practical operation permitted regulation of the flow and volume of gas delivered (R. 106). This is not, as the Commission would have it, "opinion testimony" or "ultimate conclusions * * * drawn from * * * facts" (Br. p. 11), but is fact testimony standing without contradiction. It forbids any "conclusion" that the Christmas tree valves can constitute or "serve" as a sale facility. Regardless of whether the Commission or the Court below made the finding, it is against the uncontradicted evidence by which both are concluded (Petition p. 17-18).

It seems clear not only that there is an entire want of administrative and judicial power to invade the prohibited area of Section 1(b); but that, power aside, the plain, clear authority of Section 7(c) authorizing certification of sale alone destroys all semblance of justification for such invasion.

THE HUBER AND SATURN CASES

The Commission contends that the courts in *Saturn Oil & Gas Co.* v. *Federal Power Commission* (10 Cir. 1957) 250

F. 2d 51, cert. den. 355 U.S. 956, and *Huber Corporation* v. *Federal Power Commission* (3 Cir. 1956) 236 F. 2d 550, cert. den. 352 U.S. 971, sustained jurisdiction "over producer or gatherer facilities despite similar objections" (Br. p. 5). We think the claim incorrect. In neither case did the producer raise the issues posed here. In each, the producer contested jurisdiction of the sale involved. In each, the facts were quite different from those here.

But the Commission says that *Saturn* presented claim that the effort to certify production facilities violated the production exemption (Br. p. 8). Following the Commission reference is the declaration (quoted Pet. p. 16) that the record disclosed no controversy "whether any particular facility is within or without" Commission jurisdiction. Read in context the opinion clearly discloses that the issue here was never raised or considered there; that the role played by facilities was simply in aid of the contention that the sale was jurisdictionally untouchable.

The Commission, of course, confesses a difference in the facts (Br. p. 8). This difference is basic. In *Saturn*, the producer installed and attached to the Christmas tree, "side gate valves", and "a few inches of pipe between the 'Christmas tree' and the meter of the purchasing company" (250 F. 2d at 63). These were obviously installed for the purpose of making the sale; their function, to regulate and control the rate of flow and quantity of delivery. Petitioner here installed none such. Facilities comparable in purpose and use to those of *Saturn* were installed and operated here by the purchaser, El Paso. It is El Paso's facilities which the Commission confesses are jurisdictional (Br. p. 8, FN. 3).

These substantial differences put in true perspective the Court's discussion of "facilities" (p. 69). They confirm

accuracy of the Court's statement that the case involved no jurisdictional controversy over facilities.

The Commission's attempt to liken the gate valve box and Tee shaped pipe line in Huber to Petitioner's Christmas tree (Br. p. 9) is unfaithful to that case. Petitioner's Christmas tree is bolted to the casinghead at the top of the well (Pet. p. 6, Exhibit 3 attached). Huber's gate valve box and Tee pipeline were attached to the converging end point of an extensive gathering system of pipe lines several miles removed from the eleven wells connected to it.*

Contrary to the Commission's claim, Huber's gate valve box and Tee shaped pipe line had no remote "similarity" either physically or functionally to Petitioner's Christmas tree.

The Examiner found on the evidence that Huber's gate valve box and Tee pipe were facilities for sale. The Commission likewise so found, and the Court in affirming said, "This is a fact finding supported not only by substantial evidence on the whole case, but if not accepted by Huber, certainly not credibly contradicted" (p. 556). Further, the Court noted that Huber admitted these facilities were used in its sale (p. 555). Petitioner's characterization of *Huber* and *Saturn* (Pet. p. 16-17) correctly demonstrates that they do not support the claims of the Commission nor furnish reliance to the Court below.**

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* *Huber's* eight mile gathering system is described in detail in the Presiding Examiner's decision, In the Matters of J. M. Huber Corporation, Docket Nos. G-3038 and G-4957. (See Pet. p. 16-17.)

** Equally wide of the mark is the citation of *Pennsylvania* v. *West Virginia*, (1922) 262 U.S. 553, 586 (Br. p. 7). The statement relied on is contained in a historical statement explanatory of the background of the suit, but having nothing whatever to do with any issue or evidence in support posed for decision.

CONCLUSION

As shown in the petition, it is respectfully submitted that certification of Petitioner's sale under Section 7(c) satisfies jurisdictional requirements of the Act and sufficiently clothes the Commission with all power granted it by the Act, so that the Commission's attempt, in violation of Section 1(b), to seize control of production facilities forbidden to it and unnecessary to the discharge of its lawful jurisdiction should be repulsed by this Court. Accordingly it is urged that a writ of certiorari to review the judgment of the Court below should be granted.

Respectfully submitted,

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